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ABSTRACT

This paper reviews the standards by which alleged infringements by administrators of free expression in public high school newspapers may be judged. Part one of the paper provides a background for the discussion, describing the role the First Amendment has played in public high schools and standards for evaluating alleged infringements of student expression. Part two discusses the specific First Amendment challenges students have brought as a result of restrictions on their speech. Part three explains the use of the public forum doctrine and the "Tinker" standard to analyze such allegations. Part four sets forth the "Hazelwood" decision, explaining and analyzing first the Supreme Court's determination that the newspaper was not a public forum, and second, th court's holding that distinguished "Tinker" and rejected its application to the "Hazelwood" facts, and third, examining the standard set forth by the court. Finally, part five predicts the potential impact of the "Hazelwood" decision upon both public high school-sponsored and underground student newspapers. Two hundred ten notes are included. (SR)

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The Search for a Standard for Evaluating Alleged Infringements of Public High School Student Expression

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The Search for a Standard for Evaluating

Alleged Infringements of Public High School Student Expression

In Hazelwood v. Kuhlmeier,[1] the Supreme Court ruled that public high school officials may, consistent with the First Amendment, control the style and content of school-sponsored student speech "so long as their actions are reasonably related to legitimate pedagogical concerns."[2] In so holding, the Court declined to apply two analyses commonly used to examine school districts' alleged First Amendment infringements --the public forum doctrine and "the *Tinker* standard"[3]--using a more relaxed standard for evaluating alleged infringements of student speech. This standard permits greater administrative control over expression in public high school student newspapers than the public forum doctrine and the *Tinker* standard have allowed.[4]

Part I of this paper provides a background for the discussion, describing the role the First Amendment has played in public high schools and standards for evaluating alleged infringements of student expression. Part II discusses the specific First Amendment challenges students have brought as a result of restrictions on their speech. Part III explains the use of the public forum doctrine and the *Tinker* standard to analyze such allegations. Part IV sets forth the *Hazelwood*

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[1] 108 S.Ct. 562 (1988)

[2] Id. at 571.

[3] This label, used throughout this paper, refers to the standard defined in Tinker v. Des Moines School District, 393 U.S. 503 (1988) for evaluating alleged infringements of students' First Amendment rights.

[4] This paper will focus only upon the standards used to evaluate alleged first amendment infringements in newspapers published by public high school students. Because a First Amendment action requires state action, this paper will address only public school newspapers. The first amendment protection accorded to college students may differ, and is beyond the scope of this paper. See Quarterman v. Byrd, 453 F.2d 54, 58 (2d Cir. 1971), Schwartz v. Schuker, 298 F.Supp. 238, 242 (D.C.N.Y. 1969).

decision, explaining and analyzing first the Court's determination that the newspaper was not a public forum, second, the Court's holding that distinguished *Tinker* and rejected its application to the *Hazelwood* facts, and, third, examining the standard set forth by the Court. Finally, Part V predicts the potential impact of the *Hazelwood* decision upon both public high school sponsored and "underground" student newspapers.

I. Background: Students' Rights of Expression and Schools' Rights to Regulate It.

Courts have been evaluating restrictions on expression in public high schools for more than 60 years. As early as 1923, when the debate focused upon attempts to ban teaching foreign languages,[5] parties have argued the role of the First Amendment in educational settings with varying success. Today's allegations of First Amendment infringements continue to involve school curricula,[6] but also stem from school library collections,[7] political protests,[8] religious expression,[9] student nominating speeches,[10] even school mascots.[11] Most frequently, however, the controversies have focused upon the publication of student newspapers.[12] For nearly two decades the expression in such newspapers has forced courts to

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[5] See Meyers v. Nebraska, 262 U.S. 390 (1923).

[6] See Virgil v. School Bd. of Columbia County, Fla., 677 F.Supp. 1547 (M.D. Fla. 1988).

[7] See Minarcini v. Strongsville City School Dist., 541 F.2d 577 (6th Cir. 1976).

[8] See Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), Butts v. Dallas Independent School District, 436 F.2d 728 (5th Cir. 1971).

[9] See Thompson v. Waynesboro Area Sch. Dist., 673 F.Supp. 1379 (M.D. 1987).

[10] See Bethel School Dist. No. 403 v. Fraser, 106 S.Ct. 3159 (1986).

[11] Crosby v. Hilsinger, 852 F.2d 801 (4th Cir. 1988).

[12] See Hazelwood v. Kuhlmeier, 108 S.Ct. 562 (1988), Bystrom v. Fridley High School Independent School District No. 14, 822 F. 2d 747 (8th Cir. 1987), San Diego Committee Against Registration and the Draft (CARD) v. Governing Board of the Grossmont Union High School District, 790 F.2d 1471 (9th Cir. 1986), Nicholson v. Board of Education Torrance Unified School District, 682 F.2d 858 (9th Cir. 1982), Williams v. Spencer, 622 F.2d 1200 (4th Cir. 1980), Thomas v. Board of Education, Granville Central School District, 607 F.2d 1043 (2d Cir. 1979), Trachtman v. Anker, 563 F.2d 512 (2d. Cir. 1977), Nitzberg v. Parks, 525 F.2d 378 (4th Cir. 1975), Baughman v. Freienmuth, 473 F. 2d 960 (4th Cir. 1972), Shanley v. Northeast Independent School District, Bexar County, Texas, 462 F.2d 960 (5th Cir. 1972), Quarterman v. Byrd, 453 F.2d 54 (4th Cir. 1971), Eisner v. Stamford Board of Education, 440 F.2d 803 (2d Cir. 1971), Burch v. Barker, 651 F.Supp. 1149 (W.D. Wash. 1987), Reineke v.

define an appropriate standard for analyzing alleged First Amendment infringements of student expression.

Attempts to regulate student speech have targeted both "school-sponsored"[13] and "underground"[14] publications. School-sponsored publications include both those that are official parts of school curricula[15] and extra-curricular "club" papers.[16] "Underground" papers are those that students create completely independent of school.[17] They often come under fire in two circumstances--when they surface as a result of either distribution by students on school property,[18] or when students who receive them off school premises bring them to school.[19]

II. The First Amendment Challenges

Students' challenges to school newspaper regulations, regardless of the particular type of paper at issue, typically allege the unconstitutional exercise of prior restraint, first addressed by the Supreme Court in Near v. Minnesota.[20] Most recently, in *Hazelwood*, students charged the principal with prior restraint when he deleted several objectionable articles and two admittedly unobjectionable articles scheduled to appear in the Hazelwood East High School newspaper

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Cobb County School District, 484 F.Supp. 1252 (N.D. Georgia 1980), Frasca v. Andrews, 463 F.Supp. 1043 (E.D. New York 1979), , Hernandez v. Hanson, 430 F.Supp. 1154 (E.D. Va. 1977), Gambino v. Fairfax County School Board, 429 F.Supp. 731 (1977), *aff'd* 564 F.2d 157 (4th Cir. 1977), Bayer v. Kinzler 383 F.Supp. 1164 (E.D. New York 1974), Sullivan v. Houston Independent School District, 333 F.Supp 1149 (S.D. Texas 1971).

13 *See, e.g.*, *Hazelwood*, 108 S.Ct. 562; *Nicholson*, 682 F.2d. 858; *San Diego Committee Against Registration and the Draft*, 790 F.2d 147; *Gambino*, 429 F.Supp 731.

14 *See, e.g.*, *Bystrom*, 822 F.2d 747; *Thomas*, 607 F.2d 1043; *Baughman*, 473 F.2d 960.

15 *See*, *Hazelwood*, 108 S.Ct. 562; *Reineke*, 484 F.Supp. 1252.

16 *See, e.g.*, Frasca v. Andrews, 463 F.Supp. 1043 (E.D. New York 1979).

17 See *Bystrom*, 822 F.2d 747.

18 Id.

19 *See* Thomas v. Board of Education, Granville Central School District, 607 F.2d 1043 (2d Cir 1980).

20 283 U.S. 697 (1931).

Spectrum.[21] Similarly, the court in Frasca v. Andrews[22] evaluated allegations of prior restraint stemming from the school principal's seizure of the school paper from student home room mailboxes. The seizure was based on his concern over the possible effect of the publication of two letters to the editor.[23]

High school journalists have alleged prior restraints as a result of both school policies requiring prior review of newpaper articles[24] and action taken in the absence of written guidelines.[25] Students whose "underground" papers are restricted also often allege prior restraint. For example, in Bystrom v. Fridley High School Independent School District No. 14,[26] students unsuccessfully challenged as a prior restraint the school district requirement that their "underground" publications be reviewed for compliance with a school regulation aimed at unofficial publications.[27] "Underground" student newspaper publishers have also claimed that regulations requiring prior review of their papers were overbroad and vague. For example in Eisner v. Stamford Board of Education[28] the Second Circuit ruled that a regulation requiring

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21 108 S.Ct. 562, 566.

22 463 F. Supp. 1043 (E.D.N.Y. 1979).

23 *Id*.

24 *See* Gambino v. Fairfax City School Board, 429 F.Supp. 731 (1977), *aff'd* 564 F.2d 157 (4th Cir.1977). The *Gambino* court held that the school publications regulation was invalid as applied, but declined to declare the regulations facially invalid.

25 *See Frasca*, 463 F.Supp. 1043.

26 *See* Bystrom v. Fridley High School Independent School District No. 14, 822 F.2d 747 (8th Cir. 1987).

27 In brief, the court first relied on the Court of Appeals' holding in Kuhlmeier v. Hazelwood East School District, 795 F.2d 1398 (8th Cir. 1986) that prior restraint/review by school authorities is not automatically unconstitutional. The court then held that the particular regulation at issue, prohibiting publication of obscene material as defined by the Supreme Court in Ginsberg v. New York, 390 U.S. 629 (1968), could be enforced by school officials on school property. It also held valid the parts of the regulation prohibiting: "pervasively indecent or vulgar" expression; advertisements for products prohibited by law for minors; and expression presenting a clear likelihood of disruption. In so holding, the court emphasized that its holding went only as far as to declare that the regulation was not unconstitutional on its face.

28 440 F.2d 803 (1971)

prior review of an off-campus student newspaper was overbroad in failing "to specify to whom and how material may be submitted for clearance. Absent such specifications, students are unreasonably proscribed by the terms of the policy statement from distributing any written material on school property, since the statement leaves them ignorant of clearance procedures."[29]

Similarly, in Quarterman v. Byrd,[30] the Court acknowledged the general constitutionality of pre-publication review requirements, but objected because the regulation at issue did not provide criteria for school administrators to follow in making their decision, nor a review procedure for students displeased with the decision.[31] This is similar to the *Gambino* court's ruling that the school publication regulations were not facially invalid, but were unconstitutional as applied because they lacked specific criteria for students and administrators to follow.[32]

III. Analyses of Alleged First Amendment Infringements

Historically, the public forum doctrine and the *Tinker* standard have been used to evaluate First Amendment challenges to restrictions on high school student newspaper speech. The public forum analysis requires examination of the environment in which the expression occurs, and categorizes those environments as either a public forum, limited or designated forum, or non-public forum. Restrictions on speech expressed in a public forum or a limited public forum are evaluated under a strict standard of scrutiny, while the restrictions on non-public forum expression are evaluated under the lower rational basis standard. The *Tinker* standard, on the other hand, focuses not on the environment in which the speech is expressed, but on the effect of the speech upon those people exposed to it. Although these two analyses clearly focus on very

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29 *Id*. at 810.

30 453 F.2d 54 (4th Cir. 1971).

31 *Id*. at 59.

32 Gambino v. Fairfax County School Board, 429 F.Supp. 731, 736-37 (1977), *aff'd* 564 F.2d 157 (4th Cir. 1977).

different characteristics surrounding the disputed expression, both played a significant role in evaluating alleged infringements of students' free speech rights.

A. The Public Forum Analysis:

The public forum doctrine has often been a court's first step in evaluating students' allegations of First Amendment violations by school officials. This analysis entails inquiry into the "environment"[33] in which the expression takes place in order to determine the standard of First Amendment protection accorded the restrictive behavior. That standard depends in turn both upon the practical and intended use of the property.

There are three types of fora: the traditional public forum, the limited or designated public forum, and the non-public forum. The degree of First Amendment protection accorded to expression depends upon the type of forum in which the expression takes place.

Expression is entitled to the most First Amendment protection when it occurs in "places which by long tradition or by government fiat have been devoted to assembly and debate."[34] In such circumstances, the government may successfully impose content-based restriction on speech only when it can "show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."[35] This environment is often known as a "traditional public forum."[36]

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33 The public forum analysis has been called a 'geographical' approach to first amendment law because results hinge almost entirely on the speaker's location. Farber & Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Protection*, 70 VA. L.REV. 1218 (1984).

34 Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37, 45 (1982). Justice White, writing for the majority, describes the doctrine as a spectrum, where the greatest protection exists for expression made in "streets and parks," which "have immemorially been held in trust for the use of the public, and time out of mind, have been used for purpose of assembly, communicating thoughts between citizens, and discussing public questions," quoting Hague v. CIO, 307 U.S. 496, 515 (1939).

35 460 U.S. at 45.

36 *See Perry*, 460 U.S. 37.

The First Amendment grants the same degree of protection to speech that takes place in an environment designated by the government as a forum for expression,[37] commonly called a "designated" or "limited" public forum.[38] As long as this governmental designation continues,[39] courts evaluate the speech with the same constitutional standards they apply to traditional public fora.[40] A non-public forum is defined as "[p]ublic property which is not by tradition or designation a forum for public communication."[41] In this forum, which may be reserved for its "intended purposes," restrictions on expression will be upheld "as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[42]

Closely related to the public forum doctrine are time, place and manner regulations, which stem from the Supreme Court's settled opinion that freedom of speech does not mean expressions are immune to regulation.[43] Such restrictions "are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant government interest, and that they leave open ample alternative channels for communication of the information."[44] Thus with respect to student expression, such regulations would clearly be permissible, for example, to prevent students from distributing their papers or delivering a speech in the middle of a class lecture.[45]

Use of the public forum doctrine in high school student newspaper cases has generally involved characterizing the publication's forum status, and then applying the appropriate First

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37 *Id*. at 46.

38 *Id*.

39 *Perry* points out that a "State is not required to indefinitely retain the open character of the facility." Id. at 46. But as long as it does, the traditional public forum standard of review applies.

40 *Id*. at 46.

41 *Id*.

42 Gannett Satellite Information Network v. Metro Transportation Association, 745 F.2d 767 (1984).

43 *See, e.g.*, Cox v. Louisiana, 379 U.S. 559 (1965).

44 Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1983).

45 108 S.Ct. at 574 (Brennan, dissenting).

Amendment standard. Historically, the ultimate determination has depended upon how the courts have perceived the school district's attitude toward "opening" the newspaper at issue to public expression. Some courts clearly label such publications as limited public fora, where any attempt to restrict expression will be subjected to the strictest constitutional scrutiny.[46] Other courts have considered the newspapers educational "tools" that fall into the non-public forum category. Restrictions on expression in papers so labeled therefore need only be reasonable and content-neutral to survive First Amendment challenge.[47] Indeed, that is the essence of the majority's public forum analysis in Hazelwood v. Kuhlmeier.[48]

One example of a court's determination that high school papers are limited public fora was the Ninth Circuit's decision in San Diego Committee Against Registration and the Draft (CARD) v. Governing Board of Grossmont Union High School.[49] In reasoning that the school-sponsored newspaper was intended for expression, and therefore a limited public forum[50] the court looked to Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.[51] just as the *Hazelwood* court did,[52] but used the *Cornelius* language to support a different result. *Cornelius* held that "the government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse."[53] We will see later in this paper that the *Hazelwood* court used this language to support its ruling that the high school paper at issue was intended to be part of the curriculum and not a public forum.

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46 *See, e.g.*, Gambino v. Fairfax County School Board, 429 F.Supp. 731 (1977), *aff'd* 564 F.2d 157 (1977).

47 *See Hazelwood*, 108 S.Ct. 562 (1988). See Comment, *High School Newspapers and the Public Forum Doctrine: Hazelwood School District v. Kuhlmeier*, 74 VA. L. REV. 843, 845-846 (1988).

48 108 S.Ct. 562 (1988).

49 473 U.S. 788 (1985).

50 790 F.2d 1471, 1478 (9th Cir. 1986).

51 473 U.S. 788 (1985).

52 108 S.Ct. 562, 567.

53 473 U.S. at 802.

Similarly, in Gambino v. Fairfax County School Board,[54] the school newspaper at issue was "entitled to the First Amendment protection afforded a public forum."[55] In making that determination the court first acknowledged that the school newspaper was a student activity, some of whose participants were enrolled in a journalism class and received academic credit for their work.[56] The participation of other newspaper staff members was as an extra-curricular activity.[57] Like the *CHRO* decision a nearly a decade later, the Gambino court rejected the defendants' contention that paper was an "in-house"[58] school system publication and therefore not a public forum entitled to First Amendment protection.[59]

The rejection consisted of several elements. First, the court called the defendants' classification of the paper as an in-house school publication a "mere label[ ]," adding that "[o]nce a publication is determined to be in substance a free speech forum, constitutional protections attach and the state may restrict the content of that instrument only in accordance with First Amendment dictates."[60] The court based its determination that the paper was a "vehicle for expression" on policies concerning school publications and review of past articles, examination of which led to the conclusion that the paper "was conceived, established, and operated as a conduit for student expression on a wide variety of topics."[61]

Last, the court stated that "[a] corollary of the finding that *The Farm News* was established as a vehicle for First Amendment expression and not as an official publication is that the newspaper cannot be construed objectively as an integral part of the curriculum offered at

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54 429 F.Supp. 731, aff'd 564 F.2d 157 (4th Cir.1977)

55 *Id*. at 736.

56 *Id*. at 733.

57 *Id*.

58 429 F Supp at 734.

59 *Id*.

60 *Id*.

61 *Id*. at 735.

[the school]."[62] This is significant for two reasons. First, it permitted the court to reject the School Board's justification for regulating speech based on its power to determine course content.[63] Second, it marked an occasion where a court determined that a student newspaper was a public forum in spite of its educational role. As we will see, the *Gambino* analysis differs significantly from the *Hazelwood* court's emphasis upon educators' need for curricular control as a justification for greater regulation of student speech.

B. Relying on *Tinker*

The second analysis that courts have commonly used in evaluating alleged First Amendment infringements of student newspaper expression is based on Tinker v. Des Moines Independent Community School District.[64] There the court held that the degree to which regulation of students' expression is constitutional hinges upon how much the restricted expression disrupts students and classes.[65] Although *Tinker* is almost universally cited in student newspaper cases, its facts had nothing to do with printed expression.[66]

The case concerned a policy that prohibited students from wearing armbands--in this case black armbands protesting Vietnam--to school.[67] Violating the regulation resulted in suspension, a measure imposed upon three students who subsequently brought action through their fathers.[68] The court held for the students, introducing its analysis with what is now landmark language: "It can hardly be argued that either students or teachers shed their constitutional rights

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62 *Id*. at 736.

63 *Id*.

64 393 U.S. 503 (1969).

65 Justice Fortas, quoting Burnside v. Byars, 363 F.2d 744, 749 (1966), wrote that students may express their opinions on controversial subjects without punishment "if [they] do so without 'materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others."

66 As we will see, infra, the *Hazelwood* court did not distinguish *Tinker* on this basis, but rather on the fact that the armband expression was non-school sponsored.

67 393 U.S. at 504.

68 *Id*.

to freedom of speech or expression at the schoolhouse gate."[69] The court acknowledged the necessity of giving the state and school leeway to control conduct in the schools,[70] but set constitutional limits on that control:

> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained.[71]

The court pointed to the lack of evidence that wearing armbands would interfere with schoolwork, or interfere with students' rights,[72] and theorized that the authorities' regulation stemmed from a particular desire to avoid controversy related to opposition to the fighting in Vietnam.[73] The fact that students were not prohibited from wearing such political symbols as campaign buttons and symbols of Nazism supported that theory.[74]

In addition, the court discussed earlier caselaw that emphasized the value society places on free expression in schools.[75] Quoting Justice Brennan's majority opinion in *Keyishian v. Board of Regents,*[76] the *Tinker* majority stated:

> The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth

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69 *Id*. at 506.

70 *Id*. at 507.

71 *Id*. at 509, quoting *Burnside v. Byars*, 363 F.2d 744, 749 (1966).

72 *Id*.

73 *Id*. at 510.

74 *Id*.

75 *Id*. at 511-12

76 385 U.S. 589 (1966)

"out of a multitude of tongues, [rather] than through any kind of authoritative selection."[77]

The majority used this language to emphasize its view that the exchange of ideas necessary for making students leaders must take place both inside the classroom and out.[78] The students' expression via their armbands took place in both arenas, without any disruption to classwork or individuals' rights. For that reason, the court ruled the school's regulation a First Amendment infringement,[79] thus establishing the standard on which many student newspaper decisions prior to *Hazelwood* were based.[80]

The Supreme Court's decision in *Hazelwood* included a ruling that distinguished the *Tinker* black armband expression as non-school sponsored, and therefore subject to a different standard of review than expression conveyed through a school-sponsored activity.[81] As a result, it is likely that *Tinker* will carry little weight in future courts' analyses of alleged First Amendment infringements of school-sponsored expression. It is important to note, however, that *Tinker* has long been the basis for decisions both supporting and rejecting restrictions on student speech. These pre-*Hazelwood* decisions illustrate the wide-ranging impact of *Tinker*, and are valuable in evaluating how *Hazelwood* will affect the status of students' free speech rights.

i. The Application of *Tinker* to School-Sponsored Publications

Although the *Tinker* standard emerged from a case that clearly dealt with non-school-sponsored expression, it has historically played a dominant role in evaluating alleged infringements of school-sponsored speech. Indeed courts have applied the standard to a variety of such factual situations, supporting an inference of *Tinker*'s substantial precedential role

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77 *Id*. at 512, quoting *Keyishian*, 385 U.S.at 589.

78 *Id*. at 512.

79 *Id*. at 514.

80 *See, e.g.*, Frasca v. Andrews, 463 F.Supp. 1043 (1979), Reineke v. Cobb County School District, 484 F.Supp. 1252 (1980).

81 108 S.Ct. 562, 565 (1988).

and rendering even more significant the *Hazelwood* court's decision to distinguish the case and its standard.

In one example of the *Tinker* standard's application in the context of school-sponsored expression, a court held that the standard does not "disappear merely because [a] school board has failed to adopt written policies requiring review in advance of distribution."[82] "Absent such guidelines," however, "suppression of publication by school officials must, of course, be scrutinized more carefully than if the issue were presented to the court after guideline procedures had been pursued."[83] Nonetheless, in Frasca v. Andrews, where no such guidelines existed, the court applied the standard when it found that the principal's decision to prohibit distribution of the school-sponsored paper was reasonable, given his concern about the effect of publishing two letters to the editor. The principal felt the letters --one by the boys' lacrosse team lamenting the lack of sports articles,[84] and one criticizing the student body vice-president[85]--were misleading and potentially harmful. Specifically, the principal questioned whether the entire lacrosse team had actually written the letter,[86] felt its "fighting words" might spark a confrontation,[87] and labeled some of the language obscene. and vulgar.[88] He believed the second letter would "devastate" the student vice-president, and, because it was the last issue of the year, would leave him no opportunity to defend himself.[89] Furthermore, he

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82 *Frasca* , 463 F.Supp. at 1050.

83 *Id*.

84 *Id.* The letter criticized lack of sports coverage in the paper, and demanded "a formal apology in public or else we will kick your greasy ass." It was signed by the "Pissed Off" lacrosse team. Id. at 1046. The newspaper staff responded by saying that the articles had been stolen, adding that the "hotheaded, egotistical 'Pissed Off' jocks" should be giving and not receiving an apology.

85 *Id.* The letter remarked that the student was a "disgrace" to the school, a failure at his position, was a poor student, and cheated by changing his grades on the computer. The letter's author(s) was not revealed.

86 *Id.* at 1047. Indeed, it was determined that only four team members knew about the letter.

87 *Id* . at 1047.

88 *Id.* at 1048.

89 *Id* . at 1047.

determined after investigation that most of the letter's contents were false, and, in his view, libelous.[90]

The court relied solely on *Tinker* when it held for the defendants and agreed that a substantial risk of school disruption would exist if the letters were published.[91] In so ruling, the court noted that it didn't matter that distribution was scheduled for the last day of the school year, because "the court does not interpret *Tinker* to require that 'substantial disorder' be expected to continue for any particular length of time."[92]

Interestingly, in hypothesizing as to the result if the letters to the editor had been published, the *Frasca* court said that the New York Times v. Sullivan[93] rule requiring proof of actual malice in libel actions against public figures would not serve to protect the author of the letter criticizing the student government official. Reasoning that the educational process permits one to make mistakes without suffering "damaging or irrevocable consequences,"[94] the court said that extending the Sullivan rule to high school students "would serve neither the policies of the First Amendment nor the democratic principles it seeks to further."[95]

This analysis demonstrates a philosophy basic to the *Hazelwood* rejection of Tinker's application to school-sponsored speech: deference to the educational process. The *Frasca* court remarked that "[p]art of the educational process is to learn in a protected environment where one's mistakes do not have damaging or irrevocable consequences,"[96] and pointed out that this

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[90] *Id*. at 1048. The principal also expressed concern about the school and paper's liability with respect to the statement that the student vice-president had been suspended.

[91] *Id*. at 1051-52. In addition to rejecting plaintiffs' contention that acts of prior restraint are unconstitutional unless formally written, the court rejected the defendants' argument that the lacrosse team letter could be censored because it was obscene and contained "fighting words" permissibly prohibited by the court's ruling in Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[92] *Id*. at 1051.

[93] 376 U.S. 254 (1964)

[94] 463 F.Supp. at 1052.

[95] *Id*.

[96] *Id*.

educational value exists in student government as well as student newspapers. As a result, although respect for unrestricted expression is very important, the public figure exception to libel liability should not exist with respect to a high school journalist's remarks about another student.[97] The court then added that even if the Sullivan rule were extended to the high school environment, the principal's action would be rational and reasonable given the fact that any harm would be done "without any reasonable opportunity to mitigate or correct it if wrong."[98]

Courts have also established that the *Tinker* standard does not require school officials to "await the occurrence of school disruption before exercising reasonable restraint over a student publication."[99] Rather, if the material at issue can be "reasonably forecast" to substantially disrupt or materially interfere with school activities or the rights of others,[100] school officials may permissibly restrict its expression. But the court in Reineke v. Cobb County School District[101] ruled that this was not enough to save the conduct of school officials who were charged with four acts of censorship, ranging from deletion of an article criticizing the administration's seizure of an entire previous issue, to deletion of a story containing grammar mistakes.[102] The Reineke court granted a preliminary injunction enjoining generally the prohibition of student publications unless they contained material that was obscene, libelous or could be permissibly restricted under *Tinker*. Specifically, *Tinker* did not apply to this speech that would have "at most, provoked discussion and comment among students."[103] *Tinker* has also functioned to prevent educators from restricting controversial speech by using technical errors as pretext. Application of the "material disruption" standard of *Tinker* would therefore avoid "circumvention of the [ ] rule that student expression may not be prohibited solely because of disagreement with content."[104]

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97 *Id.*

98 *Id.*

99 Reineke v. Cobb County School District, 484 F. Supp. 1252, 1257 (1980).

100 *Id.* at 1263.

101 484 F. Supp 1252 (1980).

102 *id.*

103 *Id.* at 1259.

104 *id.*

Because *Tinker* essentially established "a constitutional right which school authorities must nurture and protect, not extinguish,"[105] some courts have been careful to respect the limits the decision set. Thus the court in Bayer v. Kinzler[106] called "extremely unlikely"[107] the chances that a sex education supplement to the student newspaper "[would] cause material and substantial interference with schoolwork and discipline."[108] On the other hand, the court in Trachtman v. Anker[109] ruled that soliciting answers to a sex questionnaire (whose results were to be published in the school newspaper) could give school authorities reason to believe students might suffer psychological harm. The court held this was enough under the *Tinker* standard to permit prohibiting the questionnaire.[110]

ii. The Application of Tinker to "Underground" Student Publications

The *Tinker* standard has also been relevant in evaluating alleged First Amendment infringements of "underground" student newspaper expression. Many courts have invalidated as vague or overbroad policies imposed on such publications because, for example, they fail to describe "what amounts to a 'substantial disruption of or material interference with' school activities."[111] Indeed one court suggested that in addition to implementing regulations consistent with *Tinker*, school administrators should "have a fair give-and-take"[112] with the creators of non-school publications. Such an approach would permit an environment in which "the whole

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105 *Id*. at 1257.

106 383 F.Supp. 1164 (1974).

107 *Id*. at 1165.

108 *Id*.

109 563 F.2d 512 (1977).

110 *Id*. at 520-521. Circuit Judge Mansfield, dissenting, called the majority's holding "an entirely too vague and nebulous extension of the concept of 'rights' to support the drastic type of censorship and prior restraint sought by defendants."

111 Nitzberg v. Parks, 525 F.2d 378, 383 (4th Cir. 1975). See, also Shanley v. Northeast Independent School District, Bexar County, Texas, 462 F.2d 960 (5th Cir. 1972); Eisner v. Stamford Board of Education, 440 F.2d 803 (2d Cir. 1971).

112 *Id*. at 585.

problem might be aired; hard feelings dissipated; distrust overcome, and mutual confidence established."[113]

The *Tinker* standard does not apply where school officials "have ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith."[114] While the standard may permit condoning "an added increment of chilling effect when school officials punish strictly limited categories of speech within the school," such sanctions may not be imposed for off-campus expression.[115] Thus in Thomas v. Board of Education, Granville Central School District, where the "appellants diligently labored to ensure that [their newpaper] was printed outside the school, and that no copies were sold on school grounds,"[116] restrictions on students' expression were due the same level of scrutiny accorded that of "government officials in the public arena."[117] That scrutiny fosters a situation where "the community is not deprived of the salutary effects of expression, and educational authorities are free to establish an academic environment in which the teaching and learning process can proceed free of disruption."[118] But such authority rests on the understanding that this "substantial autonomy within their academic domain rests in part on the confinement of that power within the metes and bounds of the school itself."[119]

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113 *Id.*

114 Thomas v. Board of Education, Granville Central School District, 667 F.2d 1043, 1051 (2d Cir. 1979).

115 *Id.*

116 *Id.* at 1050.

117 *Id.*

118 *Id.*

119 *Id.* at 1052.

IV. The Effect of the Hazelwood Decision

A. The Case

In Hazelwood School District v. Kuhlmeier[120] the Supreme Court addressed "the extent to which educators may exercise editorial control over the contents of a high school newspaper produced as part of the school's journalism curriculum."[121] The respondents were three former Hazelwood East High School students, who were staff members of the school newspaper *Spectrum*.[122] The students argued that school officials, including the Hazelwood East High School principal and a teacher at the school, violated their First Amendment rights when they deleted two pages from the May 13, 1983 issue of *Spectrum*.[123]

Spectrum was part of the the school curriculum, written and edited by students enrolled in the high school's Journalism II class.[124] It was school-sponsored, and therefore held by the Supreme Court to a different standard of review than expression conveyed through non-school sponsored activity.[125] This distinction is likely to have a most significant impact upon future student newspaper cases, and indeed would seem to render off-campus, non-school expression more secure in the scope of First Amendment protection than expression with any degree of school sponsorship.

The *Hazelwood* controversy began when page proofs of the May 13 issue of *Spectrum* were routinely submitted to the Hazelwood East High School principal for review on May 10, 1983.[126] The principal objected to and deleted two articles, one discussing three students' experiences with pregnancy, and the other describing the effect of divorce on students.[127]

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120 *Id*.
121 *Id*.
122 *Id*.
123 *Id*.
124 *Id*.
125 *Id*.
126 *Id*.
127 *Id*.

The principal based his decision to delete the pregnancy article upon two concerns: first, that the identity of the pregnant students interviewed would not remain a secret, despite the use of pseudonyms in the article;[128] and second, upon his belief that references to sexual activity and birth control were inappropriate for younger members of the student body.[129] He eliminated the divorce article because he believed it should have included a response from the parents, whose child's criticism of them was quoted in the article.[130]

The principal determined that there was not sufficient time to make the story changes he wanted before the paper was scheduled to go to press, and if publication was significantly delayed, distribution could not take place before the school year ended.[131] Thus he decided, and his superiors agreed, that the only option was to reduce the paper from six pages to four, eliminating the two pages containing the articles to which he objected.[132] This action, however, eliminated several other articles to which the principal testified he had no objection.[133] These stories discussed teenage marriage, runaways, juvenile delinquents and a general article on teenage pregnancy.[134] As a result, the students began their action in the United States District Court for the Eastern District of Missouri, where, after a bench trial, the court held that there were no First Amendment violations on the part of school personnel.[135]

The District Court used the "reasonable basis"[136] standard of review seen in Frasca v. Andrews in holding that if student speech is part of the school's educational function, officials may impose restraints upon it.[137] Applying this standard to the facts, the court stated that: concern over the privacy rights of the pregnant students whose anonymity might not be preserved was

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128 *Id.*

129 *Id.* at 566.

130 *Id.*

131 *Id.*

132 *Id.*

133 *Id.* at n. 1.

134 *Id.* at 566.

135 Kuhlmeier v. Hazelwood School District, 607 F. Supp 1450 (E.D.Miss. 1985).

136 *Id.* at 1466, quoting Frasca v. Andrews, 463 F. Supp. 1043, 1052 (E.D.N.Y. 1979).

137 *Id.*

"legitimate and reasonable;"[138] the principal was justified in wanting to protect younger students from inappropriate subjects;[139] the fact that divorced parents did not have the chance to respond to their child's remarks might demonstrate a departure from the standards of fair journalism advocated by the class.[140] The court also labeled reasonable the principal's belief that deleting the entire two pages on which the articles appeared was required given the apparent time constraints.[141]

The Eighth Circuit reversed[142], basing its decision primarily on the analysis put forth in *Tinker*.[143] The court held first that the newspaper *was* a public forum, because it was intended as a means of conveying students' viewpoints.[144] Then, turning to *Tinker* the court stated that school officials could censor the material in that public forum only if the expression would cause material or substantial interference with school work, discipline or other people's rights.[145]

The court stated that there was no reasonable support for the principal's theory that the objectionable articles would have materially disrupted school activities.[146] Furthermore, it added that only expression giving rise to tort liability on the part of the school-- liability which it held would not have existed as a result of the excised articles-- would justify infringement based on interference with others' rights.[147] Therefore, the court held, the school officials had indeed infringed upon the First Amendment rights of the students bringing the action.[148]

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138 607 F.Supp. at 1466

139 *Id.*

140 *Id.*

141 *Id.*

142 Hazelwood v. Kuhlmeier, 795 F.2d 1368 (8th Cir. 1986).

143 *See* Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969).

144 795 F.2d at 1372.

145 *Id.* quoting *Tinker,* 393 U.S. at 511.

146 *Id.* at 1372.

147 *Id.*

148 *Id.*

The January 13, 1988 decision of the Supreme Court reversed the Court of Appeals' holding.[149] The Court's analyses both rejected the Eighth Circuit's determination that *Spectrum* was a public forum[150] and distinguished *Tinker* as applicable only to non-school sponsored expression.[151] As a result, the opinion's effect may well be to continue to "denude[ ] high school students of much of the First Amendment protection that Tinker itself prescribed."[152]

B. The Supreme Court's Public Forum Analysis

Because "school facilities may be deemed to be public fora only if school authorities have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public,' " the *Hazelwood* majority reasoned that *Spectrum* , as part of the school curriculum, was a non-public forum.[153]

The Court supported this characterization by pointing to the Hazelwood School Board Policy 348.51, which provided that "[s]chool sponsored publications are developed within the adapted curriculum and its educational implications in regular classroom activities."[154] Other indications of the paper's curricular role were the facts that students received credit for their work on the paper, and that the journalism teacher had significant authority over every phase of the paper's production.[155]

The majority called the Court of Appeals' argument for holding that the paper was a limited public forum "equivocal at best."[156] It argued that the Statement of Policy declaring that *Spectrum* accepts all rights implied by the First Amendment must be "understood in the context of

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149 108 S.Ct. 562, 567.

150 *Id*. at 569.

151 *Id*.

152 *Id*. at 580 (Brennan, dissenting).

153 *Id*. at 568, quoting Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37, 47 (1982).

154 *Id*.

155 *Id*.

156 *Id*.

the paper's role in the school's curriculum,"[157] and "suggests at most that the administration will not interfere with the students' exercise of those First Amendment rights that attend the publication of a school sponsored newspaper. It does not reflect an intent to expand those rights by converting a curricular newspaper into a public forum."[158] Indeed, the Court added, "a decision to teach leadership skills in the context of a classroom activity hardly implies a decision to relinquish school control over that activity."[159] As a result, the majority concluded, "school officials were entitled to regulate the contents of *Spectrum* in any reasonable manner."[160]

The *Hazelwood* majority's rationale for labeling *Spectrum* a non-public forum raises several issues. There is no question that school officials need a significant degree of control over course content and material in order to perform their educational function. Therefore, if *Spectrum* is perceived to be simply a classroom "device" akin to a particular textbook or instructor's lesson plan, then the Court's decision to label it a non-public forum may be valid. Under such a label it would follow that educators need only be reasonable in their decisions restricting expression in order to survive constitutional scrutiny.

On the other hand, it can be argued that placing the label of "non-public" on a forum that possesses characteristics of a forum that the government has intended to "open up" for expression is not valid. Examples of such characteristics are *Spectrum* 's Statement of Policy, and its role as a vehicle, distributed to the school community, for a variety of student viewpoints. Characteristics such as these that led the court in Gambino v. Fairfax County School Board[161] to label *The Farm News* a limited public forum. Indeed that decision permitted publication of speech that was arguably more controversial than that at issue in *Hazelwood* a decade later. *Gambino* involved an article entitled "Sexually Active Students Fail to Use Contraceptives,"[162] and was

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157 *Id*. at 569.
158 *Id*.
159 *Id*
160 *Id*
161 429 F Supp 731 (1977), *aff'd* 564 F.2d 157 (4th Cir. 1977).
162 *Id*

scheduled for publication in November, 1977, three months after the Fairfax County School Board issued a notice that prohibited sex education in the schools until after a decision was made on a proposed program.[163]

The *Hazelwood* court's rationale for labeling *Spectrum* a non-public forum may also be an example of why some scholars object to the public forum analysis because it "distracts from the First Amendment values at stake in a given case."[164] Indeed, the Court's analysis of *Spectrum* 's forum status could support the argument that with respect to the students' rights, few of those values were considered. The Court stated that the curricular function of the newspaper was the overriding consideration in its public forum analysis, but by its holding implied that practical application of First Amendment values is not part of that educational role. This is evident by the fact that the majority condoned the principal's deletion of several acceptable articles along with the ones to which he objected.[165] The principal's justification for the deletion was that he believed there was too little time to make any changes, and the only other alternative would have been to cancel publication of the entire issue.[166]

The issue in this particular factual situation thus becomes whether the principal had any less restrictive means available to him. It is arguable that he did not, and that given the apparent time constraints he had two choices. He could permit publication of all the articles, including several that he considered offensive and potentially tortious, or he could prohibit publication of all the articles, including two that were admittedly unobjectionable. The Court, applying the non-public forum "reasonableness" standard of review, found that the principal's decision to make the latter choice was justified.

The Court's acceptance of this justification is telling. Nothwithstanding the apparent time pressures that influenced the principal's decision, the Court's acceptance of the deletion of unobjectionable material emphasized its approval of deferring to educators' editorial decisions.

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163 *Id.*

164 *See* Farber & Nowak, 70 VA. L.REV. at 1224; Comment, 74 VA. L.REV. at 856.

165 108 S.Ct. 562, 566.

166 *Id.*

The public forum doctrine's focus on the use for which the government intended the medium rationalizes this deference. Because *Spectrum* was labelled part of the curriculum, the Court had no obligation to temper administrators' editorial control by injecting practical application of First Amendment values into the school environment.

Of course the fact that the role of educators requires that they have significant decision-making discretion makes it difficult to evaluate just what role First Amendment values play in the classroom. It can be argued that it is not the Court's duty to prescribe curricular content, regardless of the topic at issue. If that is the case, then it follows that educators are completely free to define the subject matter --both of classwork and stories--in journalism. Deleting unobjectionable articles could then be justified as an exercise of editorial, and educational, responsibilities.

But promoting First Amendment values in the classroom need not be incompatible with vesting editorial control in educators. For example, requiring a school official to permit publication of unobjectionable material would seem to demonstrate respect for students' First Amendment rights, without usurping an educator's authority. On the other hand, respect for such values does not seem to exist when unobjectionable material is deleted under circumstances in which less restrictive means would satisfy an educator's goal of responsible journalism.

Some courts have articulated respect for the First Amendment rights of students by labelling student newspapers as limited public fora.[167] In those cases, the First Amendment permitted regulations restricting expression only if they were narrowly tailored to serve a compelling governmental interest.[168] Such a standard does not permit students to publish any material they choose, but does help to insure that the particular goal which administrators seek to achieve by restricting speech is a valid one, evaluated under a strict scrutiny standard of review. The *Hazelwood* court, however, chose to grant greater deference to educators' editorial decisions

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167 *See, e.g.*, Gambino v. Fairfax County School District, 429 F.Supp. 731 (E.D. Va. 1977), *aff'd* 564 F.2d 157 (4th Cir. 1977).

168 *Id.*

by labelling school-sponsored newspapers non-public fora, subject only to a rational basis standard of review.

C. The Hazelwood Majority's Alternative to Tinker

The Hazelwood majority's second holding effectively rules out the role of the Tinker standard in disputes over expression in school-sponsored student newspapers.[169] The majority did not invalidate *Tinker*, but rather based its analysis on the premise that the expression conveyed by wearing armbands on school property in *Tinker* merits a different degree of First Amendment protection from that granted to expression conveyed through official school channels such as a school-sponsored student newspaper.[170] This distinction acted as the majority's launching pad for holding that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[171] Indeed, the court continued, "[i]t is only when the decision to censor a school-sponsored publication, theatrical production, or other vehicle of student expression has no valid educational purpose" that the court must step in to prevent the violation of students' first amendment rights.[172] Educators have this right first to assure that students learn what they are supposed to learn from the particular activity, without exposure to "inappropriate" material, and second to assure "that views of the individual speaker are not erroneously attributed to the school."[173]

The Court then applied its standard in support of the Hazelwood East principal's deletion of the two pages of the student newspaper, stating that he acted "reasonably:"

> [The principal] could reasonably have feared that the article violated whatever pledge of anonymity had been given to the pregnant students. In addition, he could reasonably have been concerned that the article was not sufficiently sensitive to the

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169 108 S.Ct. 562, 575 (Brennan, dissenting).

170 *Id.* at 569. The majority wrote that *Tinker* addressed school administrators' ability to suppress expression "that happens to occur on school premises," while *Hazelwood* considered "whether the First Amendment requires a school affirmatively to promote particular student speech."

171 *Id.* at 571.

172 *Id.* at 571.

173 *Id.* at 570.

> privacy interests of the students' boyfriends and parents, who were discussed in the article but who were given no opportunity to consent to its publication or to offer a response.[174]

The Court acknowledged that the articles contained no graphic sexual descriptions, but expressed concern that the mention of sexual histories and birth control was inappropriate for the younger students.[175] It further supported its argument by speculating about the principal's conclusions about the divorce article: "the principal could reasonably have concluded that an individual publicly identified as an inattentive parent . . . was entitled to an opportunity to defend himself as a matter of journalistic fairness."[176] It added that the principal:

> could reasonably have concluded that the students who had written and edited these articles had not sufficiently mastered those portions of the Journalism II curriculum that pertained to the treatment of controversial issues and personal attacks, the need to protect the privacy of individuals whose most intimate concerns are to be revealed in the newspaper, and "the legal, moral, and ethical restrictions imposed upon journalists within [a] school community" that includes adolescent subjects and readers.[177]

The majority thus acknowledged the reasons for which educators have a legitimate need for some degree of editorial control. First, in many circumstances there may be legitimate educational justifications for a principal's wish to edit student expression. It is clear that journalism is a subject matter analagous to any other high school course; journalism teachers, like other high school teachers, strive to instill in students a basic knowledge of the material presented. It is equally clear that fair and objective reporting is central to an understanding of journalism on any level. Thus journalism teachers and their administrative superiors must have the control to insure that goal is met, even if it means that certain student speech is edited, or, in some circumstances, deleted.

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174 *Id.* at 571.

175 *Id.*

176 *Id.* at 572.

177 *Id.*

The Court also remarked that educators may restrict expression that "members of the public might reasonably perceive the imprimateur of the school,"[178] because the educational process requires schools to remain neutral on controversial topics. That neutrality, in turn, is necessary in "awakening the child to cultural values, preparing him for later professional training, and helping him adjust normally to his environment."[179]

Whatever the Court's particular rationale for requiring such neutrality, it is not unrelated to the school's need and desire to protect itself from potential tort liability. School administrators have a legitimate interest in protecting the school from the liability that could result from publishing stories that defame or invade the privacy of any individual. This concern sets *Hazelwood* apart from *Tinker*, and provided the basis for the *Hazelwood* court's decision to distinguish school-sponsored speech from non-school-sponsored speech in the process of stating a new standard with which to evaluate alleged infringements of school-sponsored speech.

Indeed the Court pointed out that the new standard was required in order to permit a school "to refuse to lend its name and resources to the dissemination of student expression,"[180] even if that expression did not disrupt or interfere with the educational setting to the extent required by *Tinker*. The interest of the school in protecting itself against tort liability is in essence no different than that of private publishers who choose to possibly err on the side of caution in choosing to extensively edit, or even not publish, stories that could give rise to a suit filed against the publisher. It is arguable, therefore, that just as those private publishers may act to protect themselves, so too may a school administration such as Hazelwood East.

That reason provides some support for the Court's decision to distinguish school-sponsored speech and apply a lower standard of review to such speech. But the Court's reasoning raises the complex question of whether the new standard provides the educators with additional rights at the expense of the students' rights. This conflict, in turn, stems from the school's role as

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178 *Id.* at 570.

179 *Id.*, quoting Brown v. Board of Education, 347 U.S. 483, 493 (1954).

180 *Id.* at 571.

a governmental as well as educational institution, whose activities are limited by the constitution and the First Amendment. That a public school has vital interests at stake is undisputed; the lengths to which the school administration may go to protect those interests without violating the students' First Amendment rights is not.

With its new standard, the *Hazelwood* court sought to strike a balance between students' constitutional rights to air their views, and educators' rights to both instruct their students and protect themselves. In the Court's opinion, hinging the constitutionality of restrictions on school-sponsored student speech upon educators' pedagogical concerns achieved that balance.

Although it is not clear that such a balance exists, there is certainly support for the argument that the *Hazelwood* standard serves educators' goals. First, there is no question that requiring restrictions on school-sponsored student speech to bear a reasonable relationship to educators' legitimate pedagogical concerns gives journalism instructors ample discretion to make editorial decisions motivated by educational goals. Under *Hazelwood*, teachers would have little trouble justifying editorial changes to, or deletion of, stories that in their opinion failed to meet the academic requirements of fairness and objectivity.

It is also clear that a school's many legitimate pedagogical concerns include protection from tort liability. Under *Hazelwood*, therefore, any action reasonably related to preventing the school from being subject to a defamation or invasion of privacy suit would survive constitutional scrutiny.

Logically, the *Hazelwood* standard seems particularly appropriate given the circumstances of the case. The principal was forced to make his decision under apparent time pressure, arguably the single most significant factor in his choice to delete the two pages of the paper. The principal did not have the luxury of sending the objectionable material back to the class for more extensive reporting and editing, nor was there time for a new layout which would permit publication of the two unobjectionable articles.

But the Court's decision to distinguish school-sponsored from non-school-sponsored expression, and to limit the application of *Tinker* to the latter category, raised several questions by the three dissenting justices, who rejected the majority's distinction and advocated *Tinker*'s application to the *Hazelwood* facts.[181] In an opinion joined by Justices Marshall and Blackmun, Justice Brennan wrote that the Court, in distinguishing school-sponsored from non-school-sponsored speech, "erects a taxonomy of school censorship, concluding that *Tinker* applies to one category and not another." Such a "taxonomy" is without merit, Brennan continued: "[t]he Court does not, for it cannot, purport to discern from our predecents the distinction it creates."[182] Specifically, the dissent: stated that *Tinker* addresses the majority's justification that educators have the right and need to control curriculum;[183] rejected as "illegitimate" the majority's statement that there is a "pedagogical interest in shielding the high school audience from objectionable viewpoints and sensitive topics;"[184] and pointed out that the school's desire to "dissociate" itself from student expression could be achieved by less drastic methods.[185]

The dissent argued, first, that *Tinker* would still permit educators to restrict speech that disrupted a journalism curriculum,[186] but would ensure that educators could only censor student speech that would " 'materially disrup[t]' a legitimate curricular function."[187] Thus the standard would allow "censorship" of poor grammar, writing or research, because failure to do so would " 'materially disrup[t] the newspaper's curricular purpose."[188]

The same rationale would not extend, however, to an administration's censorship "designed to shield the *audience* or dissociate the *sponsor* from the expression."[189] Censorship of that

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181 108 S.Ct. 562, 575 (Brennan, dissenting).

182 *Id*. at 575.

183 *Id*. at 576.

184 *Id*.

185 *Id*.

186 *Id*.

187 *Id*.

188 *Id*.

189 *Id*.

nature "in no way furthers the curricular purposes of a student *newspaper*, unless one believes that the purpose of the school newspaper is to teach students that the press ought never report bad news, express unpopular views, or print a thought that might upset its sponsors."[190]

The dissent also criticized the principal for failing to discuss his concerns about the objectionable articles with their authors prior to the decision to delete the stories. In addition, it remarked that the principal's subsequent discussion with the students was so general as to make "the Court's supposition that the principal intended [it to be] a lesson on the nuances of journalistic responsibility [ ] utterly incredible."[191]

Second, the dissent faulted what it perceived as the Court's need to provide a standard that protected high school students from "sensitive topics." Arguing that condoning such protection would make students " 'closed-circuit recipients of only that which the State chooses to communicate,' "[192] the dissent stated that school sponsorship of a newspaper does not "license . . . thought control in the high school, whether through school suppression of disfavored viewpoints or through official assessment of topic sensitivity."[193] Indeed, in the dissent's view, the majority's standard "invites manipulation to achieve ends that cannot permissibly be achieved through blatant viewpoint discrimination and chills student speech to which school officials might not object."[194]

Last, although the dissent agreed that school-sponsorship of a newspaper increases the chances that students' views might be attributed to the school,[195] it stated that a government's admittedly legitimate and substantial purpose "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[196] Rather, the goals sought by the Court's decision could have been achieved by "dissociative means short of

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190 *Id.*

191 *Id.* at 577.

192 *Id.* at 577, quoting Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 511 (1969).

193 *Id.* at 578.

194 *Id.*

195 *Id.* at 579.

196 *Id.*

censorship."[197] Such means could include publication of a disclaimer clarifying that published views were not necessarily shared by Hazelwood educators and administrators,[198] or a statement of the school's own view and its opinion of the students' views.[199] It is not clear, however, how adequately such a disclaimer would protect a school district from tort liability in the event that published material did initiate a cause of action.

The dissent also attempted to strike a balance, but placed the weights far differently from the majority. First, it argued that under certain circumstances, *Tinker* could achieve an educator's goal of retaining curricular control, without exceeding the bounds of the First Amendment rights of the students. The strict scrutiny standard of review of *Tinker* 's "material disruption" standard would insure that students didn't publish material that was poorly written, for example, unfair, or not objective. Since, under the dissent's reasoning, school educators could require objective news stories without violating the First Amendment, then it would arguably follow that they could also better insure that their position on issues would remain neutral. Thus it can be argued that the *Hazelwood* concern that school officials raised, and the Court's standard addressed, is addressed by applying *Tinker*.

Furthermore, unlike the Court's new standard, applying *Tinker* would prevent schools from prohibiting publication of unpopular expression in an effort to guarantee neutral material. Indeed, the dissent is correct in pointing out that such a prohibition would serve only to teach students that the press shouldn't report upsetting news. There is, after all, a vast difference between bad news badly reported, and bad news skillfully reported. While *Hazelwood* could result in the prohibition of both, *Tinker* , correctly, would eliminate only the former. Indeed, controversial material contributes to the value of a student newspaper, whether it is school-sponsored or not. Students' expressions of views on subjects like divorce and teenage pregnancy are likely to promote discussion and further expression--historically the greatest value assigned to

197 *Id.*

198 *Id.*

199 *Id.*

the First Amendment. Students should thus be confident that a school newspaper can, with certain limitations, be a vehicle for their thoughts on subjects of conversation and debate in the school community. *Hazelwood*, on the other hand, could have the more severe effect of both restricting expression that could foster important communication and learning among students and breaking down students' confidence in the role of the First Amendment in the school environment.

The dissent also raised a valid concern with respect to the Court's remarks on "sensitive" or "inappropriate" topics. If a students are prohibited from expressing their views in a forum created for that very purpose, then the Court is eliminating a significant value of that forum. It can be argued that a vital educational experience exists in being able to express and react to various viewpoints, including those on sensitive subjects. Furthermore, the dissent is correct in asserting that using *Tinker* to evaluate restrictions on such viewpoints would help avert the potential viewpoint discrimination and resulting chilling effect.

Last, the dissent is accurate in its suggestion that less restrictive means could insure that students' views are not erroneously attributed to the school. It can be argued that to some degree a disclaimer or other statement by administrators would serve as a buffer in protecting schools from liability resulting from defamatory or otherwise tortious school-sponsored student expression. The extent of such protection, however, is not clear; depending on the nature of the student speech, a simple statement attempting to dissociate the school may not prove to be a sufficient shield from tort liability.

All of the dissent's criticisms essentially focus upon the Court's failure to respect the First Amendment values upon which cases like *Tinker* have been based. *Tinker* did not give students free rein of expression, but it required considerations of the curriculum and educational setting.

But both the majority and dissenting opinions pose problems which are particularly apparent when considering the *Hazelwood* standard in other contexts. First, the Court merely speculated as to the concerns the principal "could" have had with respect to publication of the

contested material. Although these concerns were undoubtedly valid, it is arguable that in many circumstances they *could* be resolved by less restrictive means than the deletion the court condoned. Absent the perceived time crunch, for example, the principal could have assuaged his concerns that the pregnancy article invaded privacy rights simply by requiring the appropriate editing changes to ensure that the article satisfied the requirements established by the journalism curriculum. The principal's concerns might even have justified postponing the paper's publication date. But *Tinker* would prohibit complete and permanent deletion of material without taking less restrictive steps first.[200] And while it may be beyond the Court's place to suggest specific review procedures, it is nonetheless arguable that in many situations the risk of school administrators' offending students First Amendment rights precludes the degree of deference the Court promoted. As a result, if circumstances allowed time for expression to be edited so that it would not be reasonably forecast to materially disrupt classwork or others' rights, then deletion would be unjustified, and constitutionally impermissible.

On the other hand, the dissent's preference for applying *Tinker* in determining the validity of restrictions on school-sponsored speech overlooks the fact that time constraints commonly exist in newspaper decision-making. Under *Tinker,* those constraints would play virtually no role in a court's evaluation of a principal's decision to edit or delete expression. Thus while *Hazelwood* grants a substantial amount of deference to an educator's decision, *Tinker* grants almost none. As a result, applying *Tinker* in all circumstances could result in administrators' risking liability regardless of their decision.

For example, if educators operating under time pressures chose to prohibit publication of speech that they felt was defamatory, they could be liable if the court, applying *Tinker,* determined that the speech was not materially disruptive. On the other hand, educators could be sued under tort law if they followed *Tinker* and published the defamatory speech. The fact that school officials are not generally well-versed in the nuances of defamation and privacy law

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200 108 S.Ct. 562, 579 (Brennan, dissenting).

complicates this dilemma. If the courts grant these officials as little deference as *Tinker* permits, educators will risk significant liability each time they make an editorial decision.

That does not mean, however, that *Hazelwood*'s new standard is the approriate answer. As the dissent correctly points out, a standard that requires only a reasonable relationship to "legitimate pedagogical concerns" arguably opens the door for wholesale censorship by some administrators who are more concerned with suppressing uncomfortable subjects and advancing morals than with teaching students journalism in a realistic forum.[201] Furthermore, controversial topics would likely encounter greater suppression than under *Tinker* because the *Hazelwood* standard operates on a rational basis standard of scrutiny.

There would, of course, be situations where school officials were justified under *Tinker* in prohibiting the publication or punishing the distributors of certain school-sponsored expression. For example, the Supreme Court ruled as constitutional a school's punishment of a student who delivered a school-sponsored nominating speech containing deliberate sexual innuendo: "freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."[202] The Court pointed out that although the *Tinker* standard permitted expression via black armbands, it did not prevent a school from fulfilling its educational function by prohibiting "the use of vulgar and offensive terms in public discourse."[203]

This would seem to support the majority's concern over the expression of sensitive topics in a curricular setting, a concern which the Court used to justify the distinction between school-sponsored and non-school-sponsored speech. But it is arguable that a speech delivered before a captive audience of classmates is more likely to profoundly disrupt a school's curricular function than sensitive subject matter presented in a carefully conceived and edited student newspaper.

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201 *Id.* at 577-78.

202 Bethel School District No. 403 v. Fraser, 478 U.S. __, 106 S.Ct. 3159, 3165 (1986).

203 *Id.*

Newspaper expression, however, poses its own problems. First, printed speech is more permanent than spoken. Its audience is a potentially larger one because the expression occurs not at a specific time, but whenever one chooses to read it. Thus with respect to the *Hazelwood* speech, it is arguable that if publication of the offensive articles was permitted, its effect would be felt as long as a single issue of *Spectrum* was available.

An issue similar to *Fraser* existed in Board of Education v. Pico,[204] where a divided Court recognized the constitutional right of a school board to remove vulgar books from a public school library.[205] The *Pico* court was careful, however, to state that: "[w]e hold that local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.' "[206] This caution is closely related to the dissent's concern that the greater the deference to educators, the greater the likelihood of viewpoint discrimination,

In addition, it should be noted that unlike *Hazelwood*, the *Fraser* and *Pico* courts did not hold that the *Tinker* standard was inapplicable to all school-sponsored speech, but rather that it did not serve to protect the restriction of speech that is vulgar and therefore potentially disruptive. This point underscores that fact that neither the *Hazelwood* nor the *Tinker* standard achieves the appropriate balance between educators' and students' rights.

Indeed it is arguable that a third standard, comprised of both *Hazelwood* and *Tinker* elements, would better accomodate the needs of public high school educators to both teach and protect their interests, while preserving students' First Amendment rights. In order to improve upon the standards already in place, such a third standard must offer a compromise between *Hazelwood*'s arguable encroachment on First Amendment values and the risk of school tort liability left unprotected by *Tinker*. Striking that compromise, in turn, requires inquiry into

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204 457 U.S. 853 (1982).

205 *Id.*

206 *Id.* at 872, quoting West Virginia Board of Education v. Barnette, 319 U.S.624, 642 (1943).

both the standard of review accorded restrictions on school-sponsored student speech, as well as appropriate definition of the educational goals behind the imposition of such restrictions.

As discussed above, the use of the strict scrutiny standard of review in *Tinker* is flawed because it vests too little deference in educators' editorial decisions, while *Hazelwood*'s reasonable basis standard of review is flawed because it vests too much. But these flaws are based upon the guidelines to which the level of scrutiny is applied as well as to the scrutiny itself. A third standard must therefore address the flaws inherent in evaluating restrictions on speech according to the degree to which such speech is "materially disruptive" or at odds with "legitimate pedagogical concerns." Those flaws are basically definitional ones, and when they are combined with the standards' respective levels of scrutiny they create the problems discussed above. For example, the "legitimate pedagogical concern" language of *Hazelwood* creates concern that educators will offer pretextual educational reasons for what are actually privately, perhaps morally, motivated restrictions on school-sponsored student speech. *Tinker* basically avoids that dilemma by focusing upon the particular effect of the expression. A successful third standard must compromise its language as well as its standard of review, for it is clear that the effect of speech cannot be the sole consideration in editorial decision; time limits and the risk of alternative liability also frame educators' choices. On the other hand, the broad label of "pedagogical concerns" may condone improperly-motivated choices.

A first step in formulating an alternative to the *Tinker* and *Hazelwood* approaches would be imposing the basic requirement that educators' attempts to regulate student speech be the least restrictive means of achieving educational goals, whether those goals focused on teaching fairness and objectivity in the classroom or protecting the school against tort liability. Such a requirement would permit school officials to account for particular factual situations, such as time constraints, in imposing restrictions on student expression. But the requirement would clearly be more strenuous than a reasonable basis standard. For example, the deletion condoned by *Hazelwood* would remain permissible under a least restrictive means standard, but only because of the perceived time pressures under which the principal felt he had to act. Deletion would not,

however, be justified in a situation lacking such pressure, because less restrictive means (such as extensive editing) would serve the school's goal. This compromise therefore tempers what under *Hazelwood* could be wholesale censorship based on fulfilling what educators deem to be legitimate pedagogical concerns. Indeed, such a requirement would instill in students an understanding of the value of the First Amendment, but the school could retain the practical educational goals of its journalism class. It does not, however, put those educators in the strict scrutiny dilemma of making concededly difficult legal determinations with potential catch-22 results.

A more effective standard would also implement language that accomodated the goals of both the "material disruption" and "legitimate pedagogical concerns" standards. This would help to strike a balance between the two extremes of deference to educators that those standards grant. One such balance would be a standard that permitted restrictions on student expression only when educational goals would otherwise be "impaired." This language, combined with the least restrictive means requirement, would provide assurance to administrators that they could restrict, even delete, speech that might subject the school to tort liability. The validity of such an act would stem from the obvious understanding that potentially tortious speech is not of the quality that would meet curricular, not to mention legal, standards of acceptability, and would therefore "impair" educational goals. But the degree of deference granted to educators would obviously fall far short of that granted by *Hazelwood*, for those whose restrictions were challenged would be required to show first, that an educational goal would otherwise have been impaired, and second, that the effort to prevent that impairment was the least restrictive one.

It would be impossible to strike a perfect balance between students' and educators' frequently divergent goals. Indeed, a least restrictive means test gives educators the opportunity to argue that particular factual circumstances justified their arguably unconstitutional actions. Furthermore, it could be argued that permitting restrictions only on speech whose expression would otherwise impair school goals is a standard similar to permitting restrictions that are

reasonably related to "legitimate pedagogical concerns." But the latter *Hazelwood* standard focuses on a wide variety of situations where restricting speech would be acceptable, as well as where it might be truly necessary to avoid school tort liability or failure to meet curricular requirements. In other words, educators could restrict student speech in any circumstance where such a restriction would serve pedagogical concerns, whether those concerns were legitimate and provable (tort liability, curriculum), or less tangible and more morally related. Such a standard, combined with a rational basis level of review, gives educators wide latitude to implement restrictions in inappropriate circumstances, interfering with students' First Amendment rights as a result. A standard that addresses situations where restrictions on speech are *necessary*, that is, where educational goals would otherwise be interfered with, arguably narrows the scope of educators' editorial powers. This is achieved by the language describing the standard, coupled with the requirement that the restrictions be the least restrictive means of achieving the school's particular end.

Given the *Hazelwood* majority opinion and the occasional narrowness that weakens the dissent's view, it appears that a valid distinction between school-sponsored and non-school-sponsored expression exists. Nonetheless, *Hazelwood* is undesirable in its failure to adequately address the First Amendment rights of students, which exist independent of the educators' interests at work. Although the language describing guidelines governing educators' restrictions on student expression plays some role in the degree to which those students' First Amendment rights are respected, it is clear that the level of respect granted is most significantly determined by the standard of review assigned to those restrictions.

D. The *Hazelwood* Impact

Like First Amendment rights, students' views on issues should not be "shed at the schoolhouse gate."[207] But *Hazelwood* licenses school administrators to be more restrictive: By declaring *Spectrum* a non-public forum, and looking only for a reasonable relationship to

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[207] Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 506 (1969).

schools' pedagogical concerns, the majority vests in educators more editorial control over curricular printed student expression than a stricter standard would permit. Efforts to exercise that control, through review and censorship, could include both the proliferation and enforcement of more stringent policies imposed on student newspapers, and, even in the absence of such policies, greater reliance on their justifications if censorship is alleged.

But as significant as the *Hazelwood* ruling appears to be, its impact must be considered in the context of the decision's scope, which the majority briefly addressed in a footnote. The Court indicated, first, that school officials may exercise pre-publication control both in the presence and absence of specific written regulations,[208] because imposing such regulations "in the context of curricular activity could unduly constrain the ability of educators to educate."[209] That the ruling applies to action taken in the absence of written publication policies breaks no new ground, but its rationale is worth noting. Obviously *Hazelwood* would not have as wide-ranging an impact if it applied only pursuant to specific written policies, for there are certainly many school newspapers that operate in the absence of policies that govern pre-publication review. And indeed courts have long held that the absence of written regulations is no bar to pre-publication review.

But the *Hazelwood* court's apparent opposition to pre-publication review policies arguably achieves an end that is fitting with the majority's apparent First Amendment philosophy and its relationship to both students and education. The majority indicated that according any measurable free speech protection to student journalists could conflict with educational goals--therefore it is not surprising that the courts' remarks on pre-publication regulations reflect that concern.

The effect of the Court's stance on pre-publication review policies, however, is difficult to predict. On one hand, some schools may take the Court's view that educators have greater flexibility in teaching and editing when they are not bound by regulations delineating the specific

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[208] 108 S.Ct. 562, 571 n. 6.

[209] *Id.* at 571.

circumstances under which pre-publication review is required or appropriate. Alternatively, educators may choose to implement pre-publication review policies, rationalizing that such policies would give students a better sense of administrators' authority and interest in reviewing curricular publications. In such cases, students might not agree with particular editorial decisions, but such decisions would likely come as less of a surprise than if officials acted on an arguably more ad hoc basis. Schools might even go so far as to permit students to play a role in the implementation of publication policies by helping to develop procedural safeguards for use in the event of alleged violations of the *Hazelwood* standard.

The second aspect of the *Hazelwood* holding focuses on what the Court did *not* address: the standard of evaluating restrictions on non-school-sponsored expression. The Court did not choose to expand the holding to address the question of whether pre-publication policies are required before school officials may censor non-school sponsored newspapers.[210] That choice, combined with the fact the the "pedagogical concern" standard applies only to curricular publications, implies that the *Tinker* standard still applies to "underground" student newspapers.

As a result, the expression in such papers may indeed receive a greater degree of First Amendment protection than its curricular counterpart. This is true primarily because of the degree to which the *Hazelwood* and *Tinker* standards differ. As discussed above, *Hazelwood* bases restriction of speech in pedagogical concerns, which school administrators typically articulate. *Tinker*, on the other hand, permits restriction of speech only if it materially inteferes with classwork or students' rights. It seems that a wider range of expression would receive protection under the the latter standard, which is less closely related to the curriculum content of classwork, than under the former. This would hold true even if the off-campus newspapers were more widely distributed and read than the school sponsored publications, and therefore had a broader student impact.

The Court's treatment of non-school-sponsored publications may have a number of effects. Students who object to restrictions on their school-sponsored expression may simply choose to

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210 *Id*. n. 6.

publish and distribute to other students their own "underground" expression. School restrictions on such expression would apparently continue to be evaluated by the stricter *Tinker* standard. As a result, therefore, *Hazelwood* may not cause as great a restriction on the free flow of student ideas as some fear.

Furthermore, school administrators' justifications for applying a more stringent standard than *Tinker* to school-sponsored papers lose some of their force if *Tinker* continues to apply to "underground" papers. Clearly educators' goals of shielding students from inappropriate or controversial material will not be as effectively fulfilled if underground papers fill the void created by restrictions on school-sponsored publications. This would limit schools' justifications for applying the stricter *Hazelwood* standard to school-sponsored speech to protection against tort liability, plus educators' stated "legitimate pedagogical concerns" such as teaching fair and objective journalism. Thus while withholding application of *Hazelwood* from non-school-sponsored speech indicates a narrower holding, it still leaves open the question of how necessary a new standard actually is, particularly given the First Amendment values at interest.

It is also necessary to consider the ramifications if *Hazelwood* had been decided differently. If, for example, the Court opted to apply *Tinker* to school-sponsored speech, and educators thus faced the "catch-22" liability issue addressed above, it is likely that some schools would simply eliminate the newspapers they had previously sponsored. That is, because educators may face tort liablility for permitting publication of material that *does* clear the *Tinker* "material disruptive" hurdle, or be liable for First Amendment infringements, they may choose to simply eliminate a school-sponsored newspaper altogether. Such a decision would not be surprising, given the risks inherent in making editorial decisions under *Tinker*. It might, however, reveal some individuals who have the attitude that a restricted paper is better than no paper.

At this point, however, the only certainty is that the *Hazelwood* decision may significantly change the degree of First Amendment protection accorded to school-sponsored

student speech. The Supreme Court's holdings amount to a grant of vast deference to educators, the constitutionality of whose actions will be subject only to a "reasonableness" standard of review. Therefore school administrators, acting in the presence or absence of written pre-publication review policies, may exercise more editorial control than many courts have previously permitted.

As the law stands, this increased control will affect only school-sponsored student newspapers. The expression of students who choose to produce independent newspapers, free of school sponsorship, will be judged by arguably stricter, *Tinker* First Amendment standards, and as a result will very likely receive greater First Amendment protection. But it is not clear whether educators will understand the law as it stands. As a result, school administrators' misinterpretations of *Hazelwood* could lead to attempts to censor both school-sponsored and non-school-sponsored student publications.

But the threshold question is whether two standards-- one for school-sponsored speech, and the other for non-school sponsored speech-- are necessary to appropriately evaluate alleged First Amendment infringements by school administrators. Furthermore, it remains arguable that all student newspapers are limited public fora, regardless of the role they play in a school curriculum. For now, however, the *Hazelwood* rulings have made these determinations, and only the actions of school officials and student publishers will demonstrate their ultimate effect.